UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8

MOSSER CONSTRUCTION, INC. **Employer** **and** **INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 46 OF OHIO** **Petitioner**	**Case No. 8-RC-16312**
and **OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION** **Intervenor**	

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds[1]:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[2]

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

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[1] All parties filed post-hearing briefs that have been duly considered.

[2] I hereby affirm the Hearing Officer's ruling granting full Intervenor status to the Operative Plasterers and Cement Masons International Association, herein OP, based on the current Section 8(f) "heavy and highway" agreement between said labor organization and the Employer's

3. The labor organizations involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> *All full-time and regular part-time journeymen and apprentice cement masons, bricklayers, pointers, cleaners and caulkers employed by the Employer, but excluding all office clerical employees and all professional employees, guards and supervisors as defined in the Act.*

Approximately 120 employees are in the unit found to be appropriate.

The Petitioner seeks a unit that includes all of the Employer's employees involved in tasks associated with bricklaying and cement work.[3] The Employer does not dispute the appropriateness of the petitioned for unit. The Intervenor raises a number of different arguments in opposition to the unit sought by the Petitioner that will be discussed further herein.

The Employer is a large general construction company headquartered in Fremont, Ohio. While is it has performed work in the past in other states, the primary area where it performs work is Ohio and Lower Michigan. It performs both building construction work and what is called "heavy and highway"

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collective bargaining representative, Ohio Contractor's Association, herein OCA. **Cf. Stockton Roofing Company, 304 NLRB 699 (1991).**

[3] Despite the Intervenor's claim to the contrary in its brief, the Petitioner did not amend its petition to limit the unit geographically to Ohio and Michigan. The record is clear that any statements by the Petitioner about so limiting the unit were made in the context of discussing a possible stipulated election agreement.

construction. The latter includes the construction of highway bridges, wastewater treatment plants, turnpike toll plazas and similar work at amusement parks. It does not impose any firm restrictions on the geographic area in which it bids work, but limits itself based on the viability of sending a group of core employees from the Fremont area to prospective job sites. This same group of core employees perform work at most of the Employer's job sites, wherever they may be located, being supplemented locally only on occasion. The Employer has separate divisions for estimating and bidding construction and heavy and highway work. Both components of the Employer's operation come under the ultimate control of the same senior and executive vice-presidents and a single labor relations manager. The Employer performs much, but not all, of its own brick, cement and carpentry work. It subcontracts out all other craftwork. The employees engaged in cement work have separate first line foreman from those engaged in bricklaying functions.[4] These individuals in turn report to a separate cement finisher superintendent and a separate bricklayer superintendent.

According to witnesses called by the Employer and Petitioner, there is a significant degree of overlap and interchange between employees who perform brickwork and those who perform cement work. While cement masons perform most of the large cement pours, the bricklayers can and have done smaller pours. While rubbing, patching and grinding of concrete are normally cement masons' work, the record is clear that bricklayers also perform this work on a regular basis. Other functions, like waterproofing, fireproofing and grouting are performed by

[4] The Petitioner is correct when it notes that there is no record evidence establishing that these

both groups. The record is also clear that both groups work side by side with some frequency on various jobs. The Intervenor argues vigorously that the Employer maintains strict lines of demarcation between the work of its masons and its bricklayers, despite the testimony referred to above. However, none of the witnesses called by the Intervenor could present any meaningful, first-hand evidence to contradict the testimony referred to above.

This employee interchange and overlap appears to be the result of a long-standing agreement between the OP and the International Union of Bricklayers and Allied Craftworkers where the former ceded jurisdiction over cement masons' work to the latter in certain counties in Ohio and other states. One such county was Sandusky County where Mosser is headquartered. As a result, employees performing both bricklayer and mason work for Mosser have long been primarily members of Bricklayers, Local 46. Until this agreement ended in 2000, Mosser provided identical wages and benefits to its employees working as masons and bricklayers, regardless of the type of work being performed. The current heavy and highway agreement that Mosser is party to is only with the OP. Nonetheless, the Employer continues to utilize its same core group of employees, most of who are members of the Petitioner, to perform this work.[5]

There is no evidence in the record that the Employer's division of work between bricklayers and masons has changed since this most recent heavy and highway agreement went into effect. Other than this statewide agreement, the

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foremen are actually supervisors within the meaning of Section 2(11) of the Act.

Employer has a limited number of contracts with other OP local unions. It has contracts with OP locals in Dayton, Akron and Columbus. It does not have a contract with the nearest local to it, OP Local 886 in Toledo. In a number of areas in Ohio, including the greater Toledo area, the Employer utilizes the services of a masonry subcontractor, McMullin Flooring Company. McMullin has contractual relationships with a number of OP locals. As for contracts with the Bricklayers Union, the Employer is currently party to a Section 8(f) agreement between the OCA and Local 46 that covers all manner of masonry and bricklaying work performed within northwestern Ohio and portions of Michigan.

In contending that it is not appropriate to direct an election in the petitioned-for unit, the Intervenor asserts that Mosser and McMullin are single employers/alter egos. It argues, therefore, that the Section 9(a) agreements between McMullin and various OP locals covering masonry work serve as a contract bar to the inclusion of masons in any appropriate unit.

As the Intervenor correctly notes, there are four criteria the Board examines in determining single employer status: a) common ownership; b common management; c) interrelation of operations and d)-centralized control of labor relations. **Hydrolines, Inc., 305 NLRB 416 (1991), Al Bryant, Inc. 260 NLRB 128 (1982).** In applying this analysis, the Board places greatest emphasis on the existence of common control of labor relations. **Gartner-Harf Co., 308 NLRB 531 (1992).**

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[5] There is testimony in the record that the so-called core group is two-thirds bricklayers and one-third "OP people". It is unclear whether this differentiation refers to the job functions the

The record evidence presented in this matter falls short of establishing that a single employer relationship exists between these two employers. In the first instance, there is no evidence of common ownership or common management. Jeffrey Haynes, who apparently holds some undefined position with McMullin, also serves as masonry superintendent for Mosser. However, there is less than convincing evidence that this latter position is anything more than a mid-level supervisory job. In addition, there is no evidence or claim that Haynes' position with Mosser carries with it any involvement in overall control of labor relations with the Employer. As for operational interrelation, the evidence reflects that McMullin performs work subcontracted from the Employer. However, showing the existence of a subcontracting relationship is not nearly enough to establish single employer status. The only other evidence of integration between the two entities shows that there is some overlap between employees and McMullin may use equipment owned by the Employer. These facts are not explained in any meaningful sense in this record and there is no basis provided for concluding that it is the result of anything other than an arms length relationship. In fact, the most that can be said about the record evidence on the relationship between Mosser and McMullin is that it answers almost none of the relevant questions of single employer status.

B.A.F., Inc., 302 NLRB 188 (1991), the case relied upon by the Intervenor, involved significantly different facts from those of this case. There, finding of alter-ego status was made on clear evidence that one individual made

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individuals usually perform or their union membership.

all management and day-to-day operational decisions for both companies. As noted above, no such evidence exists in this case. As I have concluded that a single employer relationship has not been established between the Employer and McMullin, I must also reject the Intervenor's contract bar argument.

Next, the Intervenor argues that any unit determination must separate cement masons from other employees. The basis of this argument is that the masons constitute a distinct craft unit entitled to a self-determination election before inclusion in any broader unit. In so arguing, the Intervenor directs me to the discussion in **Burns & Roe Services Corp., 313 NLRB 1307 (1994).** There the Board held that for a finding of a craft unit to be made, the evidence to be considered is whether: the employees participate in a formal training or apprenticeship program; the alleged craft work is functionally integrated with work of other employees; the duties of employees in the alleged craft overlap with those of other employees; the employer assigns work on craft or jurisdictional lines or based on need and whether the employees at issue share common interests with other employees, including wages, benefits and cross training. Further, it has been noted that such unit determinations shall not be based on jurisdictional claims and specific work tasks performed by the employees in question, but instead on the usual community of interest standards. **Mariah, Inc., 322 NLRB 586 (1996)**

The Employer and Petitioner both argue that in making this craft determination I must consider only the evidence regarding the manner in which the Employer conducts its operations. However, I recognize that the Board in

making such determinations regarding construction employees frequently weighs industry practice. Nonetheless, it is equally clear that industry practice will not control if the evidence relating to the group of employees in question warrants a different outcome. **International Paper Company, 177 NLRB 526 (1968).** Therefore, I cannot give controlling weight to the evidence the Intervenor offered regarding other employers and the industry as a whole.

As for the first criteria, participation in a formal training or apprenticeship program, the record establishes that both Unions operate such programs, but there is little or no evidence as to how many of the employees at issue have participated in said programs. As the Petitioner correctly notes, the record evidence shows that only a handful of employees may have participated in an apprenticeship program operated by one of these unions. The fact that apprenticeship programs exist does not support a claim of craft status absent clear evidence that the Employer's employees have participated in them. **Timber Products Co., 164 NLRB 1060 (1967).** To the extent that any Mosser employees may have participated in an apprenticeship program operated by Local 46, the record is clear that this program includes a significant degree of so-called "cross training"; that is, training in both bricklaying and mason work.[6] This evidence diminishes any argument that a craft unit of masons exists.

In the area of functional integration, the record is clear that employees performing as masons and those performing as bricklayers often work together on

[6] The fact that the apprentice program operated by Local 46 only recently qualified a participant for a mason's certification does not detract from the fact that it has long provided meaningful instruction in such work.

all manner of work contracted by the Employer. The Intervenor argues that this is not normally the case with other employers and offered testimony from OP representatives in support of this claim. However, these witnesses acknowledge that they have limited or no knowledge of the Employer's day-to-day operations. Accordingly, on this point, as on other issues raised in this matter, I can give only limited weight to such testimony.

As for overlap of work duties, once again the evidence firmly establishes that this Employer frequently makes work assignments cutting across so-called craft lines. The record is equally clear that the employees within the petitioned for unit enjoy similar if not identical wages and benefits. As the Petitioner accurately notes, when the Employer performs work under its agreement with Local 46, the wages and benefits for both masons and bricklayers are identical. When working under the past and current heavy and highway agreements with the Petitioner and Intervenor, the Employer's witness testified that its practice is to provide masons and bricklayers the wages and benefits provided for in that agreement, even though said agreement is technically limited to only masons work.

The Intervenor next argues that collective bargaining history dictates that I accord craft status to the employees performing masons work and further asserts that Regional Directors' decisions in other Regions have followed this pattern.

As for the first contention, I must note that the collective bargaining history of this Employer provides no support for according the masons craft status, since this has not been its practice under any of the collective bargaining

agreements to which it has been a party. Even if it were otherwise, the Board has been very reluctant to accord controlling weight to bargaining history in making these determinations. **A. C. Pavement Stripping Co., 296 NLRB 206 (1989).**

As for the latter argument, Regional Directors' decisions are not binding precedent. In addition, unit issues are case specific, determined solely by the unique facts relating to a particular group of employees. **International Paper, supra.** In sum, the only reasonable conclusion that may be drawn from this record is that the employees performing masons' work for this Employer do not constitute a clearly defined craft unit. Including these employees a broader unit with employees working as bricklayers is appropriate based on their common wages, benefits, working conditions, similar work duties and skills, and overlap of functions. **A.C. Pavement Stripping, supra and Dezcon, Inc., 295 NLRB 109 (1989).**

Finally, the Intervenor argues that any unit must be limited to only those counties in Ohio and Michigan covered by the Employer's current agreement with Local 46. Both the Petitioner and Employer argue that the unit should not be described in terms of any geographic limitations. The Board noted in **P.J. Dick Contracting, Inc., 290 NLRB 150 (1988), fn 10** that it does not normally define the scope of a bargaining unit in geographic terms. To the extent the Board has done so in that and subsequent cases, it was seemingly because the parties all sought some geographic limits, but could not agree what they should be. See for example **Oklahoma Insulation Company, 305 NLRB 812 (1991) and Dezcon, Inc., supra.**

In this case the Petitioner seeks no geographic limit to the unit and the Employer concurs. The Intervenor alone seeks such a limitation, one so restrictive that it bears no relationship to the manner in which this employer conducts its business; i.e. using the same core group of employees on most, if not all its jobs no matter where they are located.[7] The Board again noted recently that geographic limits in Section 8(f) agreements, which bear no relationship to the manner in which the employer actually conducts its business, should not be given controlling weight in making unit determinations. **Alley Drywall, Inc., 333 NLRB No. 132 (2001).** In light of the record evidence that the Employer in performing its work moves the same core group from job site to job site, I deem it appropriate to direct an election in a unit without geographic restrictions.

Since the Employer is engaged in the construction industry and the record reflects that the number of unit employees varies from time to time the eligibility of voters will be determined by the formula set forth in **Daniel Construction Co., 133 NLRB 264 (1961) and Steiny & Co., 308 NLRB 1323 (1992).**

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike

[7] In fact, the Intervenor's argument ignores the broad geographic scope of the very collective

which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Also eligible to vote are those employees who have been employed for a total of 30 working days or more within the period of 12 months immediately preceding the eligibility date for the election, or who have some employment in that period and have been employed 45 working days or more within the 24 months immediately preceding the eligibility date for the election, and who have note been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.

Those eligible shall vote whether or not they desire to be represented by: (1) International Union of Bricklayers and Allied Tradeworkers, Local 46 of Ohio; or (2) Operative Plasterers and Cement Masons International Association; or (3) Neither.

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bargaining agreement it relied on in seeking to intervene in this matter.

LIST OF VOTERS

In order to ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. **Excelsior Underwear Inc., 156 NLRB 1236 (1966)**; **N.L.R.B. v. Wyman-Gordon Co., 394 U.S. 759 (1969)**. Accordingly, it is directed that an eligibility list containing the ***full*** names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this decision. **North Macon Health Care Facility, 315 NLRB 359 (1994)**. The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington, by February 22, 2002.

Dated at Cleveland, Ohio this 8th day of February 2002.

/s/ Frederick J. Calatrello

Frederick J. Calatrello
Regional Director
National Labor Relations Board
Region 8

440-1760-9100